



Common Interest Community Board

Guidance Document: Time-Share Public Offering Statements Delivered by Way of Alternative Media; Purchaser Opportunity to Review Public Offering Statement Prior to Execution of a Contract

Adopted June 7, 2018

I. Background

Section 55-374 of the Code of Virginia outlines statutory requirements for public offering statements for time-share projects. Subsection A of § 55-374 states, in part:

The developer shall prepare and distribute to each prospective purchaser prior to the execution of a contract for the purchase of a time-share, a copy of the current public offering statement about which the time-share relates. The public offering statement shall fully and accurately disclose the material characteristics of the time-share project registered under this chapter and such time-share offered, and shall make known to each prospective purchaser all material circumstances affecting such time-share project. [Emphasis added.]

In addition, Subsection I of § 55-374 states:

The public offering statement may be in any format, including a compact disc, provided the prospective buyer has available for review, along with ample time for any questions and answers, a copy of the public offering statement prior to his execution of a contract. [Emphasis added.]

The requirement in Subsection A that developers distribute public offering statements to prospective purchasers prior to execution of a contract for purchase came about as a result of changes made to The Virginia Real Estate Time-Share Act ("Time-Share Act") in 1994. The change was made in conjunction with an amendment to purchaser's cancellation rights outlined in § 55-376 which established the cancellation period to solely be seven days from the date of contract execution. Previous to the 1994

amendment, a purchaser had the right to cancel a contract within seven days following execution of the contract or receipt of the public offering statement, whichever occurred later.

Subsection I was added to § 55-374 as a result of amendments to the Time-Share Act in 2007.

Part V of the Board's Time-Share Regulations (18 VAC 48-45-140 through 18 VAC 48-45-320) outline the requirements for public offering statements. Board Regulation 18 VAC 48-45-150 states, in part:

A. The provisions of § 55-374 of the Code of Virginia and this chapter shall be strictly construed to promote full and accurate disclosure in the public offering statement. [Emphasis added.]

Board Regulation 18 VAC 48-45-20 specifies:

"Full and accurate disclosure" means the degree of disclosure necessary to ensure reasonably complete and materially accurate representation of the time-share in order to protect the interests of purchasers.

II. Issues/Concerns

The language in § 55-374 suggests that it is the intention of the General Assembly to protect the public welfare by ensuring that prospective time-share purchasers be provided with, and have the opportunity to review, the public offering statement for a time-share product before the statutory rescission period commences. It is also evident that the General Assembly sought to give developers flexibility to furnish public offering statements to purchasers by way of alternative media other than paper copy.

Public Offering Statements Delivered by Way of Alternative Media

Periodically, the Board's staff receives inquiries from developers regarding approved forms of alternative media for distributing public offering statements. More recently, these inquiries have focused on distribution of public offering statements by way of USB Flash Drive. Though Subsection I of § 55-374 specifically references compact disc as a valid alternative medium, it would not preclude distribution of a public offering statement by flash drive or other tangible medium for data storage.

In light of changes in information technology and the increasing prevalence in use of "the Cloud" for data storage and document archival, it is possible that developers may increasingly seek to deliver public offering statements by way of network such as through an Internet website, or network document storage service (e.g. Dropbox). On at least one previous occasion in 2014, a developer requested approval to deliver a public offering statement by way of an Internet web link. After consultation with Board counsel

at the time, the developer's request was approved. It is unclear, though, as to whether these means of delivering a public offering statement to consumers were contemplated when the General Assembly added Subsection I to § 55-374 in 2007.

A review of the Board's registration files indicates that developers for at least 25 of the 86 projects registered with the Board as of May 1, 2018 (29%) provide a public offering statement by way of alternative media. It does not appear the Board has previously issued guidance regarding delivery of public offering statements through alternative media. Consumers, developers, and other members of the public may benefit from the adoption of guidelines for distribution of public offering statements through alternative media.

Delivery of Public Offering Statement Prior to Execution of Contract

Subsections A and I of § 55-374 clearly establish the requirement, regardless of the format of the public offering statement, that prospective purchasers are to receive the public offering statement before execution of a contract. Subsection I also provides that prospective purchasers have "ample time for any questions and answers" prior to execution of a contract. The requirements in Subsections A and I prescribe how a developer must act when offering or disposing of a time-share.

If a developer fails to provide a public offering statement prior to execution of a contract, or fails to give prospective purchasers adequate time to review a public offering statement, the Board can investigate complaints involving alleged violations of the Time-Share Act and take disciplinary action as appropriate. In such instances, though, the onus is on the consumer to allege the developer failed to comply with the Time-Share Act. However, it is not clear that prospective purchasers would know, or have reason to know, that a developer is required to provide a public offering statement, and afford them with ample time for questions and answers, prior their execution of a contract. Depending on the nature of the time-share project being offered, the length of a public offering statement, including exhibits, can number in the hundreds of pages, which may deter a prospective purchaser from immediately reviewing a statement upon receipt. To the extent a potential purchaser is unaware of the protection afforded to them under the Time-Share Act, a potential purchaser is placed at a significant information disadvantage in the transaction vis-à-vis the developer. The developer has greater knowledge of the material characteristics and circumstances in the time-share being offered, including any terms and conditions that might affect the purchaser's decision to accept or decline a purchase. The purpose of the public offering statement is to provide a potential purchaser with sufficient notice of these characteristics and circumstances. By reviewing the public offering statement and being afforded opportunity to have any questions answered, prior to execution of the contract, the potential purchaser can educate themselves regarding the time-share being offered, and be on more equal footing with the developer in the transaction.

To the extent a purchaser executes a purchase contract, thereby initiating the rescission period, without having first reviewed the public offering statement, the purchaser is

placed at a disadvantage. The purchaser's only remedy may be to cancel the contract during the rescission period. However, the purchaser may not be fully aware of any material characteristics and circumstances of the time-share that might have otherwise caused them to forgo a purchase, and may not become aware of these until after the rescission period has ended.

A review of time-share related complaints received by the Office of the Common Interest Community Ombudsman for the 2015-2016 reporting period (56 cases) revealed there were at least six (6) cases where the complaining parties indicated in their complaint that they did not have the opportunity to review documents prior to signing a contract. Thus far in the 2016-2017 reporting period, there are at least eight (8) time-share related complaints where the complaining parties indicated that they did not have an opportunity to review documents prior to signing a contract.

Inasmuch as the requirements to provide a public offering statement, and allow ample time for questions and answers prior to execution of a contract serve to protect consumers, adhering to these requirements is beneficial to developers. Following these requirements can place developers in a better position with respect to any complaints that may be made to the Board, as the Board can more efficiently determine whether a complaint is legitimate or simply a matter of "buyer's remorse."

The Board's regulations pertaining to public offering statements, which supplement statutory requirements under § 55-374, largely address the form and content of a public offering statement, with the principal standard being that public offering statements are to provide "full and accurate" disclosure to consumers in order for a time-share to qualify for registration. Regarding delivery of a public offering statement, Board Regulation 18 VAC 48-45-160.B provides that a developer may include a receipt page documenting a purchaser's receipt of the public offering statement. The regulations do not specifically address the requirement of delivery of a public offering statement prior to execution of a contract, or the requirement that potential purchasers be afforded an opportunity for questions and answers. Consumers, developers, and other members of the public may benefit from the Board's guidance on this issue.

III. Board Guidance

The Board adopts a guidance document that establishes the following:

1. With respect to the format of a public offering statement, Subsection I of § 55-374 should be construed to include any tangible medium commonly used for data storage (such as compact disc, DVD, flash drive/thumb drive). Subsection I shall also be construed to include distribution of a public offering statement by way of Internet web link or network document storage service (e.g. Dropbox).
2. Full and accurate disclosure in a public offering statement includes disclosure to each potential purchaser of the developer's obligations, as outlined in § 55-374, to

distribute the public offering statement to each potential purchaser prior to execution of the purchase contract; and that each potential purchaser must have the public offering statement available for review, along with ample time for questions and answers, prior to execution of the purchase contract.

3. The disclosure described in Item #2 above must be provided in either (i) the first page of the public offering statement required by Board Regulation 18 VAC 48-45-160.C; or (ii) the optional public offering statement receipt page outlined in Board Regulation 18 VAC 48-45-160.B.
4. A developer that seeks to distribute a public offering statement by way of alternative media (i.e. other than paper copy) must obtain written consent from the prospective purchaser to receive the public offering statement by way of alternative media, prior to execution of the purchase contract; and must inform prospective purchasers of the developer's obligation, as outlined in Subsection I of § 55-374, to provide potential purchasers with a copy of the public offering statement for review, and ample time for questions and answers, prior to execution of a purchase contract.